

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Z-TEL COMMUNICATIONS, INC.	}	
	}	
Complainant	}	
	}	
vs.	}	Docket No. 02-0160
	}	
ILLINOIS BELL TELEPHONE COMPANY,	}	
d/b/a AMERITECH ILLINOIS	}	
	}	
Respondent	}	

ILLINOIS BELL TELEPHONE COMPANY’S
BRIEF ON EXCEPTIONS

Illinois Bell Telephone Company (“Ameritech Illinois”) takes exception to the findings of the Proposed Order on Rehearing (the “Proposed Order”) in the above-captioned proceeding. In particular, Ameritech Illinois takes exception to the Proposed Order’s treatment of the penalty issue.

The General Assembly, when it passed the most recent re-write of the telecommunications provisions of the Public Utilities Act (the “Act”), provided, “Notwithstanding any other provision of this Act, for a second and any subsequent violation of Section 13-514 committed by a telecommunications carrier after the effective date of this amendatory Act of the 92nd General Assembly, the Commission may impose penalties” on the violating carrier. 220 ILCS 5/13-516(a)(2). The principal issue on rehearing is whether the General Assembly meant what it said in adopting that provision.

The Proposed Order would hold that it did not. That holding, if adopted by the Commission, would be unlawful, and it should be reversed.

In the initial phase of this proceeding, the Commission ruled that the violation found in this case was Ameritech Illinois' first violation of Section 13-514 since the most recent amendment of the Act. Order, Z-Tel Communications, Inc. v. Illinois Bell Telephone Co., Ill. C.C. Dkt. 02-0160, 23 (May 8, 2002). However, at the same time, the Commission ruled that Ameritech Illinois' conduct also violated Section 13-801 of the Act and was therefore independently subject to penalties under Sections 13-304 and 13-305. Id. at 23-24. Ameritech Illinois sought rehearing of the latter ruling, which the Commission granted. Certificate of Commission Action, Ill. C.C. Dkt. 02-0160 (June 21, 2002).

The Proposed Order's error on this issue is obvious, whether one approaches the issue from Section 13-516, Section 13-305 or Section 13-801.

Starting from Section 13-516, the General Assembly was quite specific in providing that a carrier's first violation of Section 13-514 would not result in civil penalties. 220 ILCS 5/13-516(a)(2). Since as the Commission's Order found, Ameritech Illinois violated Section 13-514(11) by violating Section 13-801, the Proposed Order's reading of the Act would render that provision meaningless. Such a result would violate one of the cardinal canons of construction: a statute is to be read so as to give meaning to all of its provisions. See, e.g., Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189 (1990). The

Proposed Order nowhere justifies, or even recognizes, the perversity of its decision to gut this language.¹

The Proposed Order cites, with apparent approval, the following argument advanced by Staff:

Furthermore, as Staff observes, Ameritech’s argument—that penalties from Sections [sic] 13-516 are the exclusive remedy for violations of Section 13-801—would allow Ameritech to be free from penalty for violating Section 13-801. Staff notes that such an outcome is both illogical and unjust.

Proposed Order at 9. This argument is wrong for at least two reasons. First, Staff and the Administrative Law Judge (the “ALJ”) have seriously distorted Ameritech Illinois’ position. Ameritech Illinois argues only that its first offense is free from penalties—nothing more. Thus, the assertion that “Ameritech would be free from penalty for violating Section 13-801” is a straw man, if that assertion is meant to apply to anything other than the first violation. Second, there is nothing “illogical and unjust” about applying the law as it is written. The General Assembly was very specific in providing all carriers (not just Ameritech Illinois) would not be subject to penalties for a first violation. Ignoring the Legislature’s clear statement would not only be “illogical and unjust” in Staff’s words, it would also be beyond the Commission’s authority.

The Proposed Order also agrees with Staff’s argument that “the remedies in Section 13-516(a) supplement rather than substitute for the remedies in Section 13-305.” This argument ignores the General Assembly’s directive that the Commission’s penalty

¹ It is difficult to conceive of a Section 13-514 violation that would not violate some other provision of the Act, or of the rules or orders of the Commission. As a result, the Proposed Order would eliminate the protection intended by Section 13-516(a) for virtually all such violations and for virtually all carriers.

authority under Section 13-516(a)(2), including its exclusion of a carrier's first violation, applies to violations of Section 13-514, "[n]otwithstanding any other provision of this Act." 220 ILCS 5/13-516(a)(2). In other words, the exclusion of the first violation applies regardless of Section 13-305 or anything else in the Act. The Proposed Order's view of the Act runs directly contrary to that language.

If one views the question from the perspective of Section 13-305, one must start from the explicit limitation built into that provision by the General Assembly. It applies only "in a case in which a civil penalty is not otherwise provided for under the Act." 220 ILCS 5/13-305. Because any violation of Section 13-801 is, by definition, a violation of Section 13-514(11), a civil penalty for such a violation is "otherwise provided for under the Act" in Section 13-516(a). 220 ILCS 5/13-514(11), 5/13-516(a). Staff's and the Proposed Order's assertion—that "the remedies in Section 13-516(a) supplement" those in Section 13-305—dances around the operative language but fails actually to apply it. This language admits of only one rational reading: if the Act otherwise "provides for" civil penalties, which Section 13-516(a) clearly does in this case, then Section 13-305 does not apply by its own express terms. 220 ILCS 5/13-305. Section 13-305 cannot be "supplemented" by other provisions of the Act, because it applies only to violations for which no civil penalties are "otherwise provided for under the Act." Id.

Finally, the Proposed Order is wrong when viewed from the perspective of Section 13-801 of the Act. Section 13-801(k) provides, "The Commission shall determine any matters in dispute between the incumbent local exchange carrier and the

requesting carrier pursuant to Section 13-515 of the Act.” 220 ILCS 5/13-801(k). The Proposed Order reads this provision as purely procedural and unrelated to the application of penalties. Proposed Order at 9. The Proposed Order argues, “If the legislature had meant to exempt Section 13-801 from Section 13-305 penalties, or prohibit Section 13-801 complaints independent of Section 13-514, it could have explicitly prescribed such an exclusion. Since the legislature did not do so, we find that no such exclusion should be applied.” The Proposed Order goes on to suggest that the limiting language in Section 13-305 does not “reach violations brought directly under Section 13-801.” Once again, the Proposed Order is wrong.

Regarding the first of the Proposed Order’s premises, as discussed above, the General Assembly has “otherwise provided for” civil penalties outside Section 13-305, by defining a violation of 13-801 as a violation of 13-514. Such a violation is subject to penalties under Section 13-516(a). 220 ILCS 5/13-514(11). As explained, when civil penalties are “otherwise provided for under the Act,” as they are here, Section 13-305 does not apply. *Id.* at 5/13-305. Thus, the General Assembly did “exempt” Section 13-801 violations from penalties under Section 13-305, by “otherwise” providing for civil penalties under Section 13-516(a).

Regarding the second premise, the General Assembly provided that the Commission “shall determine any matters in dispute” under Section 13-801 “pursuant to Section 13-515 of this Act.” 220 ILCS 5/13-801(k) (emphasis added). That language is mandatory, and it leaves no other options for the Commission or the parties. *See Village*

of Winfield v. Illinois State Labor Relations Bd., 176 Ill. 2d 54, 64 (1997); People v. Thomas, 171 Ill. 207, 222 (1996). Moreover, this complaint was brought pursuant to Section 13-515, so any other procedural vehicles for such a complaint are purely hypothetical.

In that context, it is not clear what the Proposed Order (at 10) means when it refers to proceedings brought “directly under Section 13-801,” but that characterization cannot be relevant to anything before the Commission here. Substantively, a violation of Section 13-801 is defined by the Act as a violation of Section 13-514(11), so there is no difference between a complaint “brought directly under Section 13-801” and one brought pursuant to Section 13-514. They are the same. 220 ILCS 5/13-514(11). Procedurally, as noted above, Section 13-801 complaints “shall” be brought pursuant to Section 13-515, and this one in fact was. (Indeed, because Section 13-801 contains no procedural provisions of its own, it is not possible to bring any action “directly under Section 13-801.”)² Once again, there is no difference between a Section 13-801 complaint and a Section 13-514 complaint. Id. at 5/13-801(k).

In short, the Proposed Order’s conclusions regarding the penalty issue are erroneous. To correct the Proposed Order’s errors, the Commission should delete the Proposed Order’s “Commission Analysis and Conclusion” regarding penalties in its entirety, and should replace it with the following:

² Staff suggested that a violation of Section 13-801 might be pursued under Section 10-108, the Commission’s general complaint process. Staff Br. on Rehearing on Penalty Issues at 3. However, no party has suggested that 13-801 has a process of its own.

The Commission agrees with Ameritech Illinois' reading of the Act and, for that reason, will not initiate a penalty proceeding.

Initially, the Commission recognizes that the General Assembly very specifically provided that a carrier's first violation of Section 13-514 is not subject to civil penalties. Our civil penalty authority in Section 13-514 proceedings applies only to "a second and any subsequent violation of Section 13-514." 220 ILCS 5/13-516(a)(2). We must construe the statute to give meaning to that provision. Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189 (1990). Staff's and Z-Tel's positions fail to do so, and they must therefore be rejected.

This conclusion is reinforced by the language of Section 13-305 of the Act, upon which Staff and Z-Tel rely as an alternative source of authority to impose civil penalties. Section 13-305 applies "in a case in which a civil penalty is not otherwise provided for under the Act." 220 ILCS 5/13-305. As Ameritech Illinois argues, any violation of Section 13-801 is, by definition, a violation of Section 13-514(11). Thus, a civil penalty for such a violation is "otherwise provided for under the Act," in Section 13-516(a). 220 ILCS 5/13-514(11), 5/13-516(a). We reject Staff's contention that Section 13-516 "supplements" Section 13-305. Since Section 13-305 applies only to violations for which civil penalties are not "otherwise provided for under the Act," it is not possible to read Sections 13-305 and 13-516(a) as cumulative.

Our conclusion is further supported by Section 13-801(k) of the Act. That section provides, "The Commission shall determine any matters in dispute between the incumbent local exchange carrier and the requesting carrier pursuant to Section 13-515 of the Act." 220 ILCS 5/13-801(k) (emphasis added). As Ameritech Illinois argues, the term "shall" is generally understood to be mandatory. Village of Winfield v. Illinois State Labor Relations Bd., 176 Ill. 2d 54, 64 (1997); People v. Thomas, 171 Ill. 207, 222 (1996). Moreover, this complaint was, in fact, brought under Section 13-515. Since Section 13-516(a)(2) of the Act provides for civil penalties applicable to violations found in a Section 13-515 proceeding, the limitations in Section 13-516 apply as well.

In addition, the Commission should delete Findings 5 through 7 and the first three ordering paragraphs of the Proposed Order, and should replace them with the following:

(5) Ameritech Illinois' request for relief on rehearing should be granted with respect to the penalty issue;

(6) Ameritech Illinois is directed, pursuant to Section 13-516(a)(3) of the Act, to pay 50 percent of Z-Tel's attorneys' fees and costs resulting from this

rehearing, reflecting the fact that Z-Tel succeeded on one issue and failed on the other, within 30 days of the issuance of this Order; and

(7) Ameritech Illinois and Z-Tel are each directed, pursuant to Section 13-515(g) of the Act, to pay the Commission's costs of investigation and conduct of the proceedings herein, again reflecting the parties' relative success on rehearing; such costs shall be paid into the Public Utility Fund within 60 days after receiving notice of the assessments from the Commission.

IT IS THEREFORE ORDERED that the Order entered by the Commission on May 8, 2002 shall be modified with respect to the penalty issue, as set forth above, but shall otherwise remain in full force and effect.

IT IS FURTHER ORDERED that Ameritech Illinois is directed to pay 50 percent of Z-Tel's attorneys' fees and costs resulting from this rehearing within 30 days of the issuance of this Order.

IT IS FURTHER ORDERED that, pursuant to Section 13-516(g) of the Act, Ameritech Illinois and Z-Tel each are ordered to pay 50 percent of the Commission's costs of investigation and conduct of the rehearing proceedings herein; such costs shall be paid into the Public Utility Fund within 60 days after receiving notice of the assessments from the Commission.

* * *

THEREFORE, for the reasons provided above and in Ameritech Illinois' previous pleadings on the penalty issue, the Commission should reject the Proposed Order's findings and conclusions on that issue and should conclude that no penalty proceeding is appropriate.

Respectfully submitted,

Ameritech Illinois

Mark A. Kerber

Mark A. Kerber
Ameritech Illinois
225 W. Randolph Street – 25D
Chicago, IL 60606
312/727-7140

Edward A. Butts
1800 W. Hawthorne Lane, Room 102
West Chicago, IL 60185
630/562-1515